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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1020

W.W.I.Z., INC.
and
SANFORD A. SCHAFITZ,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

and

ELYRIA-LORAIN BROADCASTING COMPANY,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARL L. SHIPLEY
1204 National Press Building
Washington, D. C. 20004
Attorney for Petitioners

OF COUNSEL:

Shipley, Akerman & Pickett
1204 National Press Building
Washington, D. C. 20004

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Carl L. Shipley, attorney for W.W.I.Z., Inc. and Sanford A. Schafitz, petitioners herein, respectfully requests in their behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case.

OPINION DELIVERED IN THE COURT BELOW TO BE REVIEWED

The opinion delivered in the United States Court of Appeals is No. 18,957, decided September 8, 1965, and is set out *infra* in the appendix hereto at page 1A.

Petitioners' request for a rehearing *en banc* by the same court was denied on November 19, 1965, and is set forth in the appendix hereto at page 13A.

JURISDICTION

Petitioners rely upon 28 U.S. Code Section 1254 as the basis for jurisdiction of this Court, and allege and verily believe that special and important reasons call for a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 exist, as set forth more particularly in the questions presented for review and arguments amplifying reasons relied on for allowance of writ hereinafter set forth.

QUESTIONS PRESENTED

1. Is it a denial of due process for the Federal Communications Commission to evade its statutory burden of proof in a license revocation proceeding by resorting instead to the administrative device of non-renewal of a broadcast license in order to effectuate the termination of a broadcast license for alleged unauthorized transfer of *de facto* control?

2. Is the U. S. Court of Appeals conclusion of law that "The agency's conclusions must be sustained if supported by substantial evidence even though there is substantial evidence to support the contrary conclusion of the examiner" a correct application of the law in the light of the Supreme Court decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474?

3. Is the Communications Act of 1934 an unconstitutional delegation of legislative power in that it fails to set

adequate guidelines for a distinction by the Federal Communications Commission between non-renewal and revocation proceedings as devices whereby a broadcast license can be terminated?

4. Is an opinion of the U. S. Court of Appeals which holds

> "The Commission concluded that the activities of Schafitz and Journal * * * had resulted in a transfer of *actual* control of WWIZ * * *." (emphasis supplied)

when the Commission decision it is reviewing and upon which its conclusion is based states

> "* * * it is true that there is no evidence in the record indicating that the Journal in fact attended to the day to day operation of the station * * *."

so arbitrary, capricious and erroneous as to be a denial of due process?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 1:

> "All legislative powers herein granted shall be vested in a Congress. . . ."

Amendment 5

> ". . . No person shall be deprived of property without due process of law; . . . ."

STATUTES INVOLVED

47 USC 301

> ". . . No such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. . . ."

47 USC 303 (r)

> "Make such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this chapter. . . ."

47 USC 307 (d)

". . . Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, . . . if the Commission finds that public interest, convenience, and necessity would be served thereby. . . Pending any hearing and final decision on such an application, . . . the Commission shall continue such license in effect."

47 USC 308

"The Commission may grant . . . station licenses . . . or renewals thereof, only upon written application therefor. . . ."

47 USC 310 (b)

". . . No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under Section 308 of this title. . . ."

47 USC 312 (a)

"The Commission may revoke any station license or contruction permit —

(1) for false statements knowingly made . . .;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of . . . any rule or regulation of the Commission . . .;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission . . .; or

(6) for violation of section 1304, 1343, or 1464 of Title 18."

47 USC 312 (b)

". . . The Commission may order such person to cease and desist from such action."

47 USC 312 (c)

"Before revoking a license or permit . . . or issuing a cease and desist order . . . the Commission shall serve upon the licensee . . . an order to show cause . . . ."

47 USC 312 (d)

"In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

47 USC 503 (b) (1)

"Any licensee . . . of a broadcast station who —

(A) willfully or repeatedly fails to operate such station substantially as set forth in his license . . . ,

(B) . . . fails to observe any of the provisions of this chapter or of any rule or regulation of the Commission . . . ,

(C) fails to observe any final cease and desist order issued by the Commission, . . .

shall forfeit to the United States a sum not to exceed $1,000. . . ."

STATEMENT OF CASE

In June 1955 petitioner Schafitz as an individual applied to the Federal Communications Commission for a construction permit for a new standard broadcast station to operate at Lorain, Ohio. After a hearing the application was granted on May 7, 1958, and the station went on the air on October 26, 1958. On September 18, 1958 Schafitz filed with the Commission an application for approval of assignment of his license (WWIZ) to a newly formed corporation, WWIZ, Inc., of which Schafitz was the sole stock-

holder. On October 15, 1958 the Commission approved the assignment.

On November 12, 1958 Schafitz entered into a contract to sell 90 of his 200 shares of common stock to the Lorain Journal, with closing deferred until January 28, 1959, for tax reasons. On the same day the corporation sold the Lorain Journal 200 shares of $100 preferred stock. Said transactions were reported to the FCC on the appropriate ownership report form on November 25, 1958 in accordance with the FCC's rules.

Thereafter on May 2, 1961 Schafitz entered into an agreement with the Lorain Journal, subject to FCC approval, to sell to it his remaining 110 shares of WWIZ, Inc. common stock. The agreement was filed with the FCC on May 31, 1961, and on June 5, 1961 an application for transfer of control of WWIZ, Inc. was filed with the FCC.

Subsequent thereto a competitor, Elyria-Lorain Broadcasting Co. (WEOL), petitioned the FCC to deny the WWIZ, Inc. transfer of control application, and on March 1, 1962 the Commission designated not only the WWIZ, Inc. transfer of control application for hearing, but the WWIZ, Inc. pending license renewal application as well.

After protracted hearings the FCC Hearing Examiner issued his Initial Decision granting each of the applications.

The FCC's Broadcast Bureau and WEOL excepted to the Initial Decision, and the Commission, after oral argument, reversed the Initial Decision and denied both applications in a final decision dated March 31, 1964. The U. S. Court of Appeals affirmed on September 8, 1965.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF A WRIT

Petitioners allege and verily believe that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, to wit:

The opinion below states:

> "The Commission concluded that the activities of Schafitz and Journal * * * had resulted in a transfer of actual control of WWIZ, Inc. to Journal without the prior consent of the Commission, and that Schafitz' filing of misinformation and withholding of information in regard to these matters had constituted a clear breach of his duties and responsibilities to the Commission."

The Commission in its decision reversing the Hearing Examiner's Initial Decision granting the WWIZ renewal application, stated:

> "* * * It is true that there is no evidence in the record indicating that the Journal in fact attended to the day to day operation of the station * * *."

On its face the Court of Appeals opinion is in direct conflict with the record, and is wholly erroneous. Just as this Court has refused to accept assumptions of fact which are demonstrably false, *United States v. Provident Trust Co.*, 291 U.S. 272, even when agreed to by the parties, *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, so should this Court refuse to permit the Court of Appeals to rest its decision on a demonstrably false assumption that the Commission had found an unauthorized transfer of "actual" control, as outlined hereinabove.

Further, the Court of Appeals misapplies this Court's rule in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 497, which recognizes

> "* * * that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived

with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

The Hearing Examiner in a lengthy initial decision herein based on testimony of witnesses made 43 Findings of Fact and 36 Conclusions and decided that:

> "It has been concluded that no unauthorized transfer of control of Station WWIZ from Sanford A. Schafitz to the Lorain Journal Company has taken place. There is no suggestion in the order of designation or on this record that the Lorain Journal is in any way unqualified as a licensee, or that any reason exists, other than the question of a possible unauthorized transfer, why the application for voluntary transfer of control should not be granted."

In another finding, the Hearing Examiner stated:

> "Thus, while the corporate structure devised might, if viewed in a vacuum, be considered a device whereby the Journal could exercise practical control over the corporation, the functioning of the structure in actual practice indicates that effective authority remained with Mr. Schafitz. It is concluded the arrangement was designed for the purpose of assuring that the minority stockholders in a closed corporation could safeguard its legitimate interest while leaving effective control of the operation in the hands of the majority stockholder."

Certainly the opinion below is premised on an erroneous presumption contrary to the fact that both the Hearing Examiner and the Commission found no actual control to have been transferred to or exercised by the Journal.

Similarly, the opinion below completely ignores the record wherein the Hearing Examiner found and concluded, and the Commission found that on November 25, 1958 and February 5, 1951, all of the transfers of a minority stock interest, contracts, and all other documents containing all the facts were filed with the Commission pursuant to its rules. The Court of Appeals, like the Commission, ignores the inescapable conclusion as a matter of law, that the alleged circumstances denomi-

nated an "unauthorized transfer of control" were simply preliminary negotiations of which the Commission had been notified, culminating ultimately in the filing of a transfer of control application, all in accordance with the Commission's rules.

The real motive underlying the Commission's action herein is revealed in footnote 5 in the opinion below, i.e., a sort of bill of attainder to punish the Lorain Journal in perpetuity for antitrust violations in 1950.

A more fundamental problem which has not been settled but should be settled by this Court is whether Congress has authorized the FCC to impose so severe a penalty as non-renewal of a broadcast license on so vague a ground as alleged unauthorized transfer of control through sale of a minority interest which was timely reported to the Commission. A subsidiary question is whether Congress has authorized the FCC to exact the same forfeiture of operating rights by a non-renewal action as it would through license revocation, but thereby escaping the burden of proof requirements of the Communications Act (47 U.S.C. 301, et seq.).

Section 310 (b) of the Act provides:

> "No * * * station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation * * * except on application to the Commission that the public interest, convenience and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 * * *."

Significantly the statute does not contain any prescribed penalty for either a deliberate transfer of majority corporate control, or the more difficult problem of possible inadvertent transfer of *de facto* control through assignment of a minority corporate interest.

Just as significantly, Congress did provide in terms those relatively few and extremely serious derelictions which in its policy-making judgment would justify the drastic forfeiture of station license revocation (47 U.S.C. 312):

1. "false statements knowingly made"
2. conditions warranting the Commission "in refusing to grant a license or permit on an original application"
3. "willful or repeated failure to operate substantially as set forth in the license"
4. "willful or repeated violation" of the Commission's rules.

This same penalty section provides cease and desist orders for violation of Commission rules, and section 503 (b) of the Act provides a maximum $1,000 fine for "willful and repeated" license, rule, or cease and desist order violations.

Most importantly, section 312 places on the Commission "the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission," and section 503 (b) contains procedural safeguards as to specific notice, etc., contemplating a similar burden of proof.

Contrarily, an applicant for renewal or license assignment has the burden of going forward under sections 310 (b) and 308.

Section 303 (r) of the Act (47 U.S.C. 303) authorizes the FCC to make rules, but limits that authority to rules "not inconsistent with law." The Commission has promulgated no rule purporting to put licensees on notice as to what events might trigger a non-renewal. Quite the reverse, the rules and statute speak in terms of a presumptive renewal, absent some dereliction going to the heart of the public interest, i.e., the quality of what goes

out on the air and into homes. For example, FCC rule 73.34 (47 CFR 73.34) states licenses will be issued for three years, and "when regularly renewed, at three year intervals thereafter."

By denying petitioners' license renewal application, the FCC effectively and substantially revoked WWIZ's broadcast license. Its stated reason was that Schafitz, although he had filed a timely report of the sale of a minority stock interest, had nonetheless set up a corporate structure "whereby the Journal could exercise control over the corporation," and that this had been done without FCC authorization, a violation of the rule justifying non-renewal of the WWIZ license.

The opinion below in effect decides that Congress has authorized forfeiture of license as a penalty for unauthorized transfer of control, and that the burden of going forward, proof, and procedural steps provided in revocation cases under the Act do not implicitly limit the FCC's discretion to use non-renewal to achieve the same purpose by another name, thus avoiding the statutory safeguards Congress intended for so extreme a sanction.

Petitioners respectfully suggest that actual control of what goes out on the air, not potential control, is the social purpose intended in section 310 (b) of the Act, and that in any event Congress has not authorized the FCC to evade the procedural safeguards of section 312 by the strategem of renewal application denial. Moreover, by explicitly defining the wrongs warranting revocation, Congress intended to have the FCC use reprimands, short term renewals, fines, temporary authority, and cease and desist orders as sanctions in cases of technical violations not *malum in se*.

The opinion of the court below ignores this Court's teaching in *Federal Radio Commission v. Nelson Bros. Co.*, 389 U.S. 266:

> "Dealing with activities admittedly within its regulatory power, the Congress established the Commis-

> sion as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards in a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern the action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. * * * A finding without substantial evidence to support it — an arbitrary or capricious finding — does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province, and does not trench upon, or involve the exercise of, administrative authority."

A principle which should guide this Court in granting a writ herein is the problem raised by the FCC's use of its administrative authority to deny a license renewal, thereby effecting a forfeiture of petitioners' right to use the license, and a forfeiture of petitioners' investment in broadcast equipment. As stated by this Court in *Farmers & Mechanics National Bank v. Dearing*, 91 U.S. 29:

> "Forfeitures are not favored in the law. Courts always incline against them."

Although section 301 of the Act provides "no such (broadcast) license shall be construed to create any right, beyond the terms, conditions, and periods of the license," the inchoate right of use of a frequency upon license renewal as well as the immediate right of use of the license frequency is a valuable property and entitles petitioners to the constitutional protection of due process, as well as protection against an unreasonable forfeiture of that right. As stated by this Court in *Henneford v. Silas Mason Co.*, 300 U.S. 577:

> "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership."

The court below places great reliance on *FCC V. WOKO, Inc.*, 329 U.S. 223, as holding that misrepresentation or concealment as to stock ownership is adequate ground for denial of renewal. In that case a 24% stockholder, who received his stock interest for using his influence as a CBS vice-president to line up a network affiliation contract, in this Court's words, "for many years and in many applications concealed the fact that the Pickard's held this stock interest and represented that the shares were held by others." The purpose was to keep Pickard's interest from being known to his CBS colleagues.

The *WOKO* case bears no relation to the case at bar — the FCC received from Schafitz a report of every stock interest. There was no concealment, no repeated pattern of deception. In the *WOKO* case the question was repeated concealment and deception for many years of a minority interest — a false statement case.

In the *WWIZ* case there was no concealment, no repetition, no deception. The central question is whether the transfer and report thereof to the FCC of a minority voting stock interest, coupled with a completely revealed and filed, and reported corporate structure, amounted to a *de facto* transfer of potential control, even though a transfer application was subsequently filed to obtain approval of the proposed actual transfer of control. If so, has Congress authorized the FCC to impose a forfeiture through denial of a renewal application, when the statute explicitly sets out the grounds justifying a forfeiture through revocation, and *de facto* transfer of potential control is not one of those grounds?

The mere fact that the court below can even see a similarity between the two cases justifies this Court in granting a writ of certiorari in order to settle the confusion on this important question of federal law.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL L. SHIPLEY
1204 National Press Building
Washington, D. C. 20004
Attorney for Petitioners

OF COUNSEL:

Shipley, Akerman & Pickett
1204 National Press Building
Washington, D. C. 20004

APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 18,955

The Lorain Journal Company, *Appellant*, v. Federal Communications Commission, *Appellee*, Elyria-Lorain Broadcasting Company, *Intervenor*.

No. 18,957

W.W.I.Z., Inc. and Sanford A. Schafitz, *Appellants*, v. Federal Communications Commission, *Appellee*, Elyria-Lorain Broadcasting Company, *Intervenor*.

Decided September 8, 1965

* * *

LEVENTHAL, Circuit Judge: These consolidated cases involve appeals [1] by The Lorain Journal Company (Journal) [2] in Case No. 18,955, and by W.W.I.Z., Inc. (WWIZ Inc.) and Sanford A. Schafitz (Schafitz) in Case No. 18,-957, from the decision of the Federal Communications Commission (Commission) of March 25, 1964, denying both the application of WWIZ Inc. filed July 5, 1961, for renewal of license of Station WWIZ, Lorain, Ohio, and an application filed June 5, 1961, for transfer of control of WWIZ, Inc. from Schafitz to Journal. They also appeal from the Commission's order of September 16, 1964, denying appellants' petitions for rehearing and reconsideration.

The Commission concluded that the activities of Schafitz and Journal, recounted in detail in the Commission's

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[1] The appeals are brought under Section 402(b) (1), (2), (3) and (6) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 402(b) (1), (2), (3) and (6).

[2] We agree with Journal and the Commission that Journal's standing is not mooted by Shafitz' [sic] announcement that he was withdrawing from his contract to sell his stock to Journal.

findings of fact, had resulted in a transfer of actual control of WWIZ, Inc. to Journal without the prior consent of the Commission, and that Schafitz' filing of misinformation and withholding of information in regard to these matters had constituted a clear breach of his duties and responsibilities to the Commission.[3] We are of the opinion that the Commission's conclusions were amply supported by underlying findings of fact, in turn predicated upon substantial evidence of record. We summarize these findings though our condensation loses much of the flavor of the transactions imparted by the Commission's extended development.

In September 1958, Schafitz was advised by Harry Horvitz, Journal's president, that Journal desired to obtain an interest in Station WWIZ, for which Schafitz had received a construction permit on May 7, 1958.[4] There was some discussion concerning purchase of the entire station, which Schafitz valued at $125,000. But Horvitz did not press for this since he believed it might prejudice a then-pending effort by Mansfield Journal Company to acquire the assignment of license of Station WCLW at Mansfield, Ohio,[5] and because he did not wish to afford Elyria-

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[3] That decision is reported in 36 F.C.C. 561, 2 R.R.2d 169 (1964).

[4] *Sanford A. Schafitz*, 24 F.C.C. 363, 14 R.R. 852 (1958).

[5] The Commission had previously found the publisher of The Lorain Journal newspaper, and the Mansfield Journal Company, under common ownership with Journal, not qualified to hold broadcast licenses because of certain activities directed toward suppressing competition in the dissemination of news and information. *In re Fostoria Broadcasting Co. v. FCC*, 86 U.S. App. D.C. 102, 180 F.2d 28 (1950).

The activities of the Journal in suppressing competition resulted in its being subjected to a successful prosecution for violation of the Sherman Antitrust Act. See *United States v. Lorain Journal Co.*, 92 F. Supp. 794 (N.D. Ohio, 1950); affirmed *sub. nom. Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

Lorain Broadcasting Company, an unfriendly competitor,[6] an opportunity to force a lengthy Commission hearing on a transfer of control of WWIZ. A hearing would have delayed any payment to Schafitz whose interest in the transaction was whetted by his immediate need for $55,000 to put his Station WXTV, Youngstown, on the air. Since Horvitz was unwilling to pay $55,000 for a minority interest, they reached an understanding that Schafitz would organize a corporation in which Journal would hold the preferred stock and 45% of the common stock. The corporation was organized following the plan outlined by Journal's attorney.

On September 18, 1958, pursuant to such plan, Schafitz filed with the Commission an application seeking assignment of the WWIZ construction permit from himself to a corporation (WWIZ, Inc.) in which he was, so far as the Commission was advised, to be the 100% stockholder. Asked by the form for a "full narrative statement of the circumstances leading to the assignment (or transfer) and the reasons therefor" and for a table showing the disposition of the stock before and after the assignment he replied:

> This is an application to change from an individual permittee to a corporation permittee. All of the stock of the corporation is held by the present permittee, Sanford A. Schafitz. No other stockholders or persons are involved in the ownership of the new corporation. The assignee is WWIZ, Inc., an Ohio corporation. It is authorized for 200 shares, of which 110 will be issued to Sanford A. Schafitz, and 90 will remain in the Corporation.
>
> The purpose of the assignment to a corporation is to take advantage of its legal rights and privileges which are well known to the law.

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[6] Elyria-Journal intervened in the Commission proceeding and on the appeal to this court, playing an active role in pointing up significant aspects of the case. It opposed the transfer to the Journal, but did not take a position on the application of WWIZ, Inc. for renewal.

Shortly after the Commission approved the assignment to WWIZ, Inc., on October 15, 1958, Schafitz acquiesced in changes in the charter and by-laws demanded by Horvitz which effectively deprived Schafitz of majority control by vesting certain key decision-making authority in a two-thirds majority vote of the common stock and in a three man board of directors consisting of Horvitz, Schafitz and Wickens, referred to below; by requiring on all checks a co-signature representing Journal's interests; and by converting the preferred to a $100 par 6% cumulative participating preferred which gave Journal dividends each year of $1200 plus 72.5% of all other dividends declared. In addition to these legal changes, WWIZ books were kept by Journal staff and at the offices of Journal.

The Commission stated that it considered the Examiner's contrary findings as to transfer of control to be lacking in major aspects. It examined at length and in depth the three factors emphasized by the Examiner as indicating that the developments only constituted steps of a minority owner to safeguard its investment:

(a) The first was the fact that Wickens, the third director, was a responsible attorney and not a mere creature of Journal. The Commission noted that in fact, Wickens' participation in the affairs of the Corporation was pro forma, since Horvitz obtained Schafitz' agreement in advance to any proposals he desired; and moreover emergence of Wickens as director tended to complete the pattern of Schafitz' divestiture of control, since normally a majority owner would select his own counsel as director, while Wickens had been a total stranger to Schafitz prior to his being designated at Horvitz' suggestion as statutory agent, but had done legal work for Journal in the past and listed Journal as one of his representative clients in the Martindale-Hubbell Law Directory.

(b) While the Examiner found that the keeping of the books by the Journal staff saved WWIZ, Inc. trouble and expense and was merely a device to enable a substantial

minority owner to keep close scrutiny of controlling owner's management, the Commission concluded that the arrangements went beyond normal business practice for mere minority protection and resulted in control passing to Journal by means of its hold on the corporation's purse strings. The Commission emphasized that the co-signature requirement provided Horvitz with constant information as to receipts and expenditures; in practice the Journal staff withheld checks for unusual expenditures pending Horvitz' approval; this was in a background whereby Journal actually provided the initial operating capital of WWIZ, Inc., starting with $5,000 advanced on October 22, 1958, shortly after Schafitz orally agreed to the Horvitz changes; and Journal in essence paid the costs of station construction by reimbursements to Schafitz.

(c) The Examiner found that actual conduct of business and broadcast operations remained with Schafitz. This was true for the first six months of operations, but subsequently, the Commission noted, Schafitz gave the station only half his time, for about five months, less thereafter, and no time whatever by May 1960. As appellee aptly remarks, Schafitz acted like a man who had relinquished control and was awaiting a propitious time to sell out his stock holdings, while Horvitz' attitude was that of a proprietor steadfastly attending to business.

We have carefully examined the Commission's consideration of the Examiner's views because of the claim of appellant Journal that the Commission had failed to give sufficient weight to the Examiner's findings under the standard of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). We are fully appreciative of the importance of the contribution of the hearing examiners to the maintenance of the rule of law in the decisions of administrative agencies. But their authority to render initial decisions does not mean that the various boards and commissions are relegated to the role of reviewing courts who sustain fact findings of courts of first instance unless clearly erroneous. *FCC v. Allentown Broadcasting Co.*,

349 U.S. 358, 364 (1955). The responsibility for decision is placed in the Commissioners appointed by the President and confirmed by the Senate to discharge the function of administering the statutes under the agency's cognizance.

The agency heads must take the decision of the examiner into account. Indeed, we have only recently remanded a board decision which changed the decision rendered by the examiner without adequate showing of the basis on which it rejected the examiner's conclusion. *Retail Store Employees Union v. NLRB*, No. 19051 ___ U.S. App. D.C. ___, ___ F.2d ___, decided July 13, 1965. But the foregoing recital clearly shows that in this case the Commission did study and address itself to the salient conclusions and reasoning of the Examiner. Thereafter, it is for the agency to draw its own inferences and reach its own conclusions for implementing the statutory mandate. The agency's conclusions must be sustained if supported by substantial evidence even though there is also substantial evidence to support the contrary conclusion of the examiner. The Examiner's report is entitled only to "such probative force as it intrinsically commands" (see 340 U.S. at 495). In this case, even assuming that the Examiner's report reflects a plausible view of the evidence, it does not negative the Commission's conclusions as a permissible view of the significance of the facts shown by the evidence. There are indeed items of evidence supporting the Examiner's conclusion. There are also countervailing factors. It is for the Commission to measure the force of the various vectors and to charge the resultant in the parallelogram of forces.

In dealing with concepts like "control" or its transfer we are concerned with a subject matter where useful perspective is gained from experience in business operations and the affairs of the world at large, and where particularly insightful judgments may be provided by the agency heads who have the benefit of the views of the agency's

technicians and examiners without the requirement of according them total deference.

Appellants' arguments are colored by underlying suppositions that the transfers interdicted are of legal control or conditions approximating legal control. Section 310(b) of the Communications Act of 1934, as amended, speaks in broad terms in its prohibition of transfer of license or of control of any corporation holding a license except on application to the Commission and a finding that the public interest will be served thereby.[7] We agree with the Commission that the statute is to be implemented in accordance with the agency's interpretation that passage of control need "not be legal control in a formal sense, but may consist of actual control by virtue of the special circumstances presented." *Town and Country Radio, Inc.*, 15 Pike & Fischer, R.R. 1035, at 1057 (1960), and decisions cited. This view is in accord with court decisions under other statutes.[8] The Commission's findings of transfer of control, supported by substantial evidence, suffice to show a violation of the statute, and an implication of all the appellants in responsibility therefor.

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[7] Section 310(b), 47 U.S.C. § 310(b) provides in pertinent part as follows: "No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. . . ."

[8] *Rochester Telephone Corp. v. United States*, 307 U.S. 124 (1939), *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 163-65 (1957); *American Gas & Electric Co. v. SEC*, 77 U.S. App. D.C. 174, 134 F.2d 633 (1934), *cert. denied*, 319 U.S. 763 (1943). Appellants WWIZ, Inc. and Schafitz observe that these cases involve corporate giants with diffuse ownership of voting stock. For such corporations it is easier to show factual control in a minority stockholder, but as a matter of principle the cases do negative the need to show legal control.

There is also evidentiary support for the Commission's conclusion that Schafitz' application to assign the construction permit to WWIZ, Inc., and its amendment, failed to contain any information concerning the actual purpose underlying the formation of the corporation, namely, to enable Journal to acquire a substantial interest therein, and reflected a failure to exercise the candor the Commission must demand from its licensees and a clear breach of Schafitz' responsibilities to the Commission.[9] Schafitz' response as to the circumstances leading to the assignment to WWIZ, Inc. was hardly the "full narrative

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[9] We quote from the Commission's decision (see 2 R.R. 2d at 191-92): "For example, the application as filed stated that WWIZ, Inc. was being formed 'to take advantage of its legal rights and privileges which are well known to the law.' In actuality, it was being formed by Schafitz to implement the plan of Horvitz and Kane whereby the Journal could place in the hands of Schafitz $55,000 for his immediate use in connection with the construction of WXTV, in return for which the Journal could obtain an interest in the Lorain radio station without flagging the attention of the Commission or its long-standing opponent Elyria-Lorain Broadcasting Company. Further, in such assignment application, Schafitz expressly represented (a) that 'There are no contracts, agreements or understandings by which the stock is transferred'; (b) that 'no other stockholders or persons involved in the ownership of the new corporation'; and (c) that 'the corporation is authorized for 200 shares of which 110 will be issued to Sanford A. Schafitz and 90 will remain in the corporation.' Contrary to these express representations, the 55-45% split of common stock which was ultimately utilized had already been discussed at this time as had the Journal's preferred stock ownership. Additionally, when this application was amended on September 30, 1958, Schafitz submitted a statement representing that the station would be constructed and operated with funds and equipment furnished by him. A balance sheet appended to this commitment 'to show that such funds and equipment are available' reflected only Schafitz' personal assets and liabilities. A projected balance sheet filed at this same time contained no amounts reflecting anticipated proceeds from the sale of stock in the corporation to the Journal, Schafitz merely stating at the bottom of this projected balance sheet that, 'If additional financing is desirable, the Corporation may sell up to 90 shares of Voting stock.'"

statement" specified by the Commission's form. Together with his submissions regarding the financing of WWIZ, Inc., there is justification for the Commission's findings that Schafitz' lack of licensee responsibility in allowing control of the station to slip from his hands without approval was compounded by filing of misinformation and withholding of information. Indeed, these departures from the responsibility of disclosure are evidentiary of the de-facto shift in control contemplated by the parties. The best that can be said for Schafitz is that he was desperate for money and was trying, in vain it developed, to save his television station in Youngstown. But of course that does not justify bypassing the public interest in Lorain.

Ownership Reports were filed by appellants in November 1958, and February 1959, setting forth the issuance to Journal first of 200 shares of preferred stock and later of 90 shares of common stock. These relatively routine ownership reports showing the sale of stock in a licensee corporation call for no action by the Commission, though they are on file and can be examined by the press and interested parties when and if occasion arises. They plainly do not discharge the responsibility imposed by statute and regulations for initiating requests for the consent required where a sale is part of a factual transfer of control. The Commission expressly warned the industry of this in its Public Notice on Procedure of Transfer and Assignment of Licenses, 4 Pike & Fischer, R.R. 342 (1948), where it also advised that in doubtful and borderline cases, as to whether a proposed transaction would result in a transfer of control within the meaning of Section 310(b), doubt should be resolved by bringing the complete facts of the proposed transaction to the Commission's attention for a ruling in advance of any consummation of the transaction. The Commission was not asked by appellants for its determination until 1961, when Schafitz contracted to sell his remaining 110 shares of common stock to Journal, and the application for transfer of control was filed.

Counsel for appellants WWIZ, Inc. and Schafitz argue that the non-disclosure finding was pumped up out of all proportion to its real significance, that this is a statute based on private ownership and is not a general disclosure statute like those administered by the Securities and Exchange Commission. It is the genius of our system that instead of government ownership we retain the spark of private profit and the drive of private enterprise, maintained under government surveillance at critical pressure points of regulatory policy. We do not welcome a gigantic bureaucracy second-guessing corporate management on details. But it is needful that the regulatory agencies be alerted and fairly and fully informed upon the emergence of a situation identified as a pressure point by law or regulation.

A cardinal assumption of the regulatory system is undercut by a pattern of false or evasive reports. That misrepresentation or concealment of the true conditions as to underlying ownership is adequate ground for denial of renewal of license was established in *FCC v. WOKO, Inc.* 329 U.S. 223 (1946), where Justice Jackson remarked (p. 227): "The fact of concealment may be more significant than the facts concealed."

Counsel also argue that businessmen can not be held to a standard of conduct as sophisticated as that which may be reasonably demanded of a lawyer. Even businessmen are held to high standards of punctilio when they are in positions of joint venture. *Meinhard v. Salmon,* 249 N.Y. 458, 164 N.E. 545 (1928). It does not seem too much to ask that federal licensees be scrupulous in providing complete and meaningful information provided for in forms and regulations. But this case does not involve difficult philosophical questions for even relatively low standards of disclosure would be violated by the submissions depicted in this record.

Furthermore, it should be noted that the Commission also rested denial of the renewal application on Schafitz'

lack of licensee responsibility as evidenced by his inattention to the station and its operation in violation of Commission rules—specifically the failure to employ a first-class radio telephone operator, fictitious logging and failure to discontinue remote operation when the remote meters were not functioning. The findings of these violations do not appear to be seriously contested and in any event are supported by substantial evidence.[10]

Counsel contends the non-renewal of the license is a wholly disproportionate sanction, particularly for the operating violations, and suggests that the monetary penalty power recently made available to the Commission[11] should suffice for such minor transgressions. The transgressions reviewed above are not to be dismissed as merely venial sin. We can not properly examine the violations one at a time and seek to determine the proper sanction therefor. The Commission was called upon to

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[10] Appellants say that such "technical" operating violations are never used as ground for non-renewal of licenses. The Commission responds that where technical violations are compounded by misrepresentations to the Commission concerning the violations the Commission has refused renewal. *Leo Joseph Theriot*, 32 F.C.C. 599, 22 R.R. 237 (1962). The Examiner's opinion suggests that even in such case the Commission has granted the equivalent of a short term renewal on taking mitigating circumstances into consideration (citing F.C.C. Public Notice released February 6, 1963, Circular No. 31408).

Insofar as the Commission found mitigating circumstances for Schafitz, it apparently took them into account by granting Schafitz a renewal of license of Station WFAR, Farrell, Pennsylvania — another docket in the consolidated proceedings. There is patently no merit to counsel's contention that this grant is inconsistent with and therefore undercuts the conclusion that the violations were serious enough for a denial of renewal for WWIZ, Lorain. The findings of the Examiner, accepted by the Commission, were favorable concerning Schafitz' operation in Farrell, a community adjacent to Sharon, his life-long residence.

[11] Pub. L. 86-752, 47 U.S.C. § 503(b).

consider the entire fact situation. As WOKO makes clear, the choice of remedies and sanctions is a matter wherein the Commission has broad discretion. We see nothing to warrant judicial intervention here on the ground that this discretion has been abused.

Appellants also argue that non-renewal of the license will be injurious to the public which will be deprived of the station and its service to the community. This is peculiarly a consideration to be addressed to the discretion and judgment of the Commission and not of this court.[12] We would hesitate to say the Commission was required to provide irresponsible service as better for the public than no service. But there is no reason to suppose the Commission was faced with that dilemma. While it may not be strictly a matter of judicial notice we may open our eyes to the facts of life sufficiently to postulate as a possible factor supporting the presumption of validity of its actions, unless negatived by some showing of record, that the Commission may reasonably have forecast that applications for the vacated frequency will not be in short supply.

Sundry other contentions of the appellants have been duly examined. We find no basis for reversal.

Affirmed.

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[12] In *Immaculate Conception Church v. FCC*, 116 U.S. App. D.C. 73, 320 F.2d 795, *cert. denied*, 375 U.S. 904 (1963), we held that the Commission need not consider the public service rendered by a station where the licensee has been guilty of attempts to deceive the Commission. This court affirmed *In re Eleven Ten Broadcasting Corp.*, 32 F.C.C. 706, 22 R.R. 699 (1962), which noted that meritorious program fare while the application is under consideration provides no assurance that the pattern of deception will not be resumed.

[Filed NOV 19 1965]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,957 September Term, 1965

W.W.I.Z., Inc., and
Sanford A. Schafitz,

Appellants,

v.

Federal Communications Commission,

Appellee.

Elyria-Lorain Broadcasting Co.,

Intervenor.

Before: Bazelon, Chief Judge, and Fahy, Washington, Danaher, Burger, Wright, McGowan, Tamm, and Leventhal, Circuit Judges, in Chambers.

ORDER

On consideration of appellants' petition for rehearing *en banc*, it is

ORDERED by the court *en banc* that appellants' petition is denied.

Per Curiam.